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Supreme Court, U.S.
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No. 95-2006

In the Supreme Court of the United States

OCTOBER TERM, 1995

SAMUEL FRANK, SHERIFF, ORANGE COUNTY, VERMONT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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13pp

QUESTION PRESENTED

The Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)(2), provides, *inter alia*, that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (CLEO) (the chief of police or sheriff) of the transferee's residence shall make a "reasonable effort" to ascertain whether the transferee's receipt or possession of the handgun would be in violation of the law. The Act also requires (18 U.S.C. 922(6)(B) and (C)) that the CLEO shall, upon request, provide the would-be purchaser with a written explanation of reasons for a conclusion that the transfer would be unlawful, and shall destroy records relating to the transfer upon a conclusion that no legal impediment to a handgun sale exists.

The question presented is whether these provisions of the Brady Act exceed Congress's power under the Commerce Clause or contravene the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 78 F.3d 815. The opinion of the district court (Pet. App. 43a-76a) is reported at 860 F. Supp. 1030.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1996. The petition for a writ of certiorari was filed on June 13, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title I of the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.* (GCA), establishes a comprehensive federal regulatory scheme governing the manufacture and

distribution of firearms in interstate commerce. Under the GCA, it is unlawful for certain persons, such as convicted felons and fugitives from justice, to receive or possess firearms in interstate commerce. See 18 U.S.C. 922(g). Under the GCA, it is also unlawful for any person to transfer a firearm to another, knowing that the transferee is prohibited by Section 922(g) from receiving or possessing a firearm. See 18 U.S.C. 922(d).

In the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (Brady Act or Act), Congress amended the GCA to address the national "epidemic of gun violence" by enhancing enforcement of its restrictions on gun transfer. See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993). The Brady Act requires the federal government to establish a national instant criminal background check system by November 30, 1998. 18 U.S.C. 922 note. Once that system is in place, firearms dealers will be required (with certain exceptions) to refer any proposed firearm transfer to the system to determine whether any legal impediment exists to the sale. 18 U.S.C. 922(t)(1)(A).

Because the national instant criminal background check system may not be fully operative until late 1998, Congress also enacted interim provisions to enhance enforcement of the GCA's transfer restrictions. Those interim provisions, which are the subject of this case, operate in relation to proposed transfers of handguns by federally licensed firearms dealers. Under the interim provisions, firearms dealers who propose to transfer a handgun must provide the "chief law enforcement officer" (CLEO) of

the transferee's residence[1] with information about the proposed transfer, and may not make the transfer until five business days have elapsed after providing such notice. See 18 U.S.C. 922(s)(1)(A). If, within that five-day period, the CLEO informs the dealer that the CLEO has no information that the transferee's receipt or possession of a handgun would be illegal, then the transfer may go forward. See 18 U.S.C. 922(s)(1)(A)(ii)(II). The transfer may also go forward after five days if the dealer receives no information from the CLEO at all. See 18 U.S.C. 922(s)(1)(A)(ii)(I).

To enable CLEOs to determine whether receipt of a handgun would be illegal, prospective gun purchasers must provide firearms dealers with their name, address, and date of birth. 18 U.S.C. 922(s)(1)(A)(i)(I) and (3)(A). The dealer then must pass on the content of the statement to the jurisdiction's CLEO. 18 U.S.C. 922(s)(1)(A)(i)(III) and (IV). During the ensuing five-day waiting period, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

> A chief law enforcement officer to whom a transferor has provided notice * * * shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law,

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[1] The Brady Act defines the "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8). The Brady Act's interim provisions do not apply in States and Territories that have their own background check requirements. 18 U.S.C. 922(s)(1)(C) and (D); see 59 Fed. Reg. 37,534 (1994).

> including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. 922(s)(2).

Shortly after enactment of the Brady Act, the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (ATF), which is charged with interpretation and implementation of the GCA (see 18 U.S.C. 926; 37 Fed. Reg. 11,696-11,697 (1972)), issued an open letter providing guidance to CLEOs on, *inter alia*, the "reasonable effort" provision. See 95-1478 U.S. Resp. App. at 13a-17a.[2] ATF explained that, since CLEOs themselves are in the "best position to determine" what constitutes a "reasonable effort," *id.* at 15a, "[e]ach * * * CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction," *id.* at 14a-15a. ATF further explained that, while the Act generally "anticipates some minimal effort to check commonly available records," CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." *Id.* at 13a-14a. ATF also made clear that, since the "vast majority of [disqualified] persons * * * are prohibited by virtue of some criminal background," a CLEO's reasonable effort should

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[2] "95-1478 U.S. Resp. App." refers to the appendix to the United States' response to the petition for a writ of certiorari filed in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996). We have provided petitioner with a copy of that response.

normally focus on criminal history records. *Id.* at 14a. Finally, ATF noted that, in some limited circumstances, such as when the CLEO has personal knowledge of a gun purchaser, a CLEO may legitimately decide that it is "reasonable" to do no research at all. *Id.* at 14a-15a.

The Brady Act does not require that a CLEO act to prevent the transfer of a handgun if the CLEO concludes that the purchaser's receipt of the gun would be illegal. Thus, if the CLEO determines, for investigative or law enforcement purposes, that the transfer should be permitted to go forward, the CLEO may decline to inform the firearms dealer that the transfer is unlawful. If, however, the CLEO finds no impediment to the proposed handgun sale, the records related to the referral from the firearms dealer must be destroyed. 18 U.S.C. 922(s)(6)(B)(i). And if the CLEO determines that the prospective purchaser's receipt of the handgun would be unlawful and so informs the dealer, the CLEO must, upon request from the prospective purchaser, provide written reasons for the determination within 20 business days. 18 U.S.C. 922(s)(6)(C). The Brady Act provides CLEOs with immunity from damages actions for failing to prevent an unlawful handgun sale, or for mistakenly concluding that a transfer would be contrary to law. 18 U.S.C. 922(s)(7).

2. Petitioner Samuel Frank is the Sheriff of Orange County, Vermont. Pet. App. 3a. He contends that several of the Brady Act's interim requirements violate the Tenth Amendment. He brought suit in district court, seeking a declaratory judgment and an injunction against enforcement of the background-check provision, the requirement of destruction of records relating to background checks, and the

requirement of a written statement of reasons for persons determined by a CLEO to be ineligible to receive a firearm. *Id.* at 50a.

The district court held that the "reasonable effort" provision contravenes the Tenth Amendment. Pet. App. 74a. On that basis, the court enjoined the United States from enforcing the "reasonable effort" provision in Vermont. *Id.* at 75a. The court also held that the "reasonable effort" requirement is severable from the remainder of the Brady Act, including the Act's five-day waiting period for handgun sales. *Ibid.*

3. Both parties appealed, and the court of appeals upheld the Brady Act in its entirety. Pet. App. 1a-39a. The court concluded that "the obligations imposed on CLEOs by the Brady Act do not entrench on those powers reserved to the States by the Tenth Amendment." *Id.* at 32a. In reaching that conclusion, the court determined that the Act's background-check requirement does not "impose[] a structural burden inconsistent with the plan established by the Constitution; nor does it impose an onerous quantitative burden on state or local officials." *Id.* at 21a-22a.

The court stated that, "[t]o help navigate safely through the murky waters of Tenth Amendment doctrine, it is necessary to dispel the notion that the federal government may never compel action by state officials." Pet. App. 18a. The court rejected petitioner's contention that, under *New York* v. *United States*, 505 U.S. 144 (1992), "Congress may never compel state officials to perform duties and may only seek to guide States' behavior by attaching conditions to federal funds, threatening preemption, or passing generally-applicable legislation." Pet. App. 22a. Instead, the court observed, *New York* prohibits the federal government only from "mobiliz[ing] 'the legis-

lative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 22a-23a (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

The court noted that, in a case like *New York*, where the federal government compels States to regulate, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision[s]." Pet. App. 25a (quoting *New York*, 505 U.S. at 169). In this case, by contrast, the court concluded that, "[b]ecause the [Brady] Act neither requires States to enact regulations by requiring them to fashion their own solutions, nor abdicates political responsibility in the handgun field," the Brady Act passes constitutional muster under *New York*. Pet. App. 24a.

The court then considered the extent of the burden that the Act imposes on CLEOs, and found it to be "minimal." Pet. App. 32a. The court explained that, "[a]part from th[e] specific prohibition ['against directing States to legislate or to regulate'], the severity of the burden placed on States is the touchstone for determining whether national legislation is so onerous as to threaten the effectiveness of the States in our federal system." *Id.* at 20a. The court concluded that "the Act is * * * not unconstitutional by virtue of the magnitude of the burden." *Id.* at 32a.[3]

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[3] Before addressing the merits, the panel majority rejected the government's contention that petitioner lacked Article III standing because, after petitioner filed this action, ATF, at

DISCUSSION

The question presented by this petition is the same as the question presented in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996), and *Mack* v. *United States*, cert. granted, No. 95-1503 (June 17, 1996). Accordingly, the petition in this case should be held pending the decision in *Printz* and *Mack*.[4]

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the request of the state safety commissioner, designated a Lieutenant of the Vermont State Police as the CLEO for Orange County, Vermont. See Pet. App. 9a-17a. Judge Miner concurred in the result, and agreed with the government that petitioner lacked standing to sue; he therefore did not reach the merits of petitioner's Tenth Amendment claim. *Id.* at 39a-43a. We continue to believe that petitioner lacks standing, and the doubts about his standing make this case an inappropriate vehicle for plenary review of the Tenth Amendment issue. Even if petitioner has standing, the district court should not have entered an injunction preventing enforcement of the Act's interim duty provisions in the entire State of Vermont, but should have limited injunctive relief to petitioner, especially since other sheriffs in Vermont have not objected to undertaking the interim duties. See Gov't C.A. Br. 45-49; cf. *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1018 (1995).

[4] In our petition for a writ of certiorari in *United States* v. *Koog*, No. 95-2052 (filed June 19, 1996), which seeks review of the Fifth Circuit's decision holding the interim duty provisions of the Brady Act unconstitutional, see *Koog* v. *United States*, 79 F.3d 452 (1996), we similarly suggested that the petition be held pending the Court's decision in *Printz* and *Mack* and then disposed of as appropriate in light of that decision. We have furnished petitioner with a copy of our petition in *Koog*.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996), and *Mack* v. *United States*, cert. granted, No. 95-1503 (June 17, 1996), and then disposed of as appropriate in light of the decision in those cases.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JULY 1996